No. 09-1454, 09-1478

In The Supreme Court of the United States

BOB CAMRETA, *Petitioner*,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, *Respondents*.

JAMES ALFORD, *Petitioner*,
DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON

v.

SARAH GREENE, personally and as next friend for S.G., a minor, *Respondents*,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FAMILY DEFENSE CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI[1]

The Family Defense Center is a not-for-profit legal advocacy organization whose mission is to advocate justice for families in the child welfare system; its motto is: "To protect children, defend families." The Family Defense Center's founder and executive director, Diane L. Redleaf, is counsel for the amicus Family Defense Center. Ms. Redleaf, a leading child advocate and family rights lawyer for over 30 years, has litigated dozens of precedent-setting cases, including cases concerning children's rights to counsel, foster children's entitlements to foster care benefits, and family members' rights to due process in child abuse and neglect investigations. Ms. Redleaf founded the Center in 2005; in 2010, the Center received the first Excellent Emerging Organization Award of the Axelson Center for Non-profit Management for leadership in the field of child welfare law.

The Center's core practice area is legal representation of families involved in child protection investigations. The Center also works in the areas of policy advocacy, community legal education, and systemic reform litigation (including precedential appeals and civil rights cases). The Center supports the respondent mother and child in

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* certify that no counsel for a party to this action authored any part of this brief, nor did any person or entity, other than the *amicus*, its members, or its counsel make a monetary contribution to fund the preparation or submission of this brief.

this case based on its extensive work on behalf children and families who are subjected to traumatic investigations that harm children instead of protecting them.

SUMMARY OF ARGUMENT

The petitioners' briefs highlight the "epidemic" of child abuse in America, arguing that this epidemic and its consequences establish a compelling state interest that, they say, their in-school police/child protective services ("CPS") custodial interrogation policy furthers. Alford Br. 28-29, 36; Camreta Br. 11, 23-24. Preventing child abuse is, of course, a legitimate state concern. Child sexual abuse, in particular, harms its victims and causes the many consequences the petitioners cite. *Id.* But the State has no interest in conducting investigations *per se*; investigations merely are a means to fulfilling the goal of protecting children from abuse. Where no abuse is uncovered, investigations provide no benefit to the State, drain resources that could be better targeted to children in genuine need of protection, and cause unjustified harm to innocent children and families. In such cases, the State's purported justification for its actions as fulfilling the state interest in child protection fails. Because the overwhelming number of investigations would reap no benefit from the in-school police/CPS custodial interrogation policy and practice, or would be negatively affected by this policy and practice, this Court should reject the petitioners' pleas that such

interrogations are "reasonable at their inception." Camreta Br. 9-12, 18, 21, 34, 38, 45.

1. The statistics the petitioners and their amici cite in making a case for a compelling state interest, along with other evidence they omit, show a different epidemic—and in vastly greater numbers—than the one they describe: an epidemic of over-reporting, over-investigation, over-intrusion into children's and families' personal lives. This epidemic includes dramatically inflated but erroneous findings of child abuse or neglect. While child abuse is a serious problem, the actual numbers of school-aged children who are seriously abused and genuinely require State protection is a small fraction of the number of children swept into the child protection system each year. The harm to the children and families done by the system, in the name of protecting children from their parents, remains dramatically underreported but very significant. (Section I *infra*).

2. Examined dispassionately, child sexual abuse allegations are rife with the potential for misinterpretation, mistake and exaggeration. While sexual abuse is among the most serious of harms to children, child sexual abuse reports cover a huge gamut of conduct, from utterly heinous acts of violence to innocent or innocuous touching of a child by a parent or loved one. Child sexual abuse allegations are among the easiest to lodge and the hardest to disprove; these allegations are also particularly prone to abuse and misuse for ulterior

or misguided purposes. Contrary to petitioners' suggestion that there is a need for fast action to question children whenever a child sexual abuse allegation has been called in to a child abuse hotline ("Hotline"), Alford Br. 44, Camreta Br. 27, rushing to interview a possible child abuse victim can be the best recipe for a botched sexual abuse investigation. Indeed, experts on child sexual abuse caution a very different approach to eliciting children's statements than the petitioners espouse. (Section II *infra*).

3. The case of S.G. and her family typifies the epidemic of unproven and un-provable child abuse allegations that traumatize children, tear families apart and do not protect children in the process. The feared harm to S.G. and her sister—sexual abuse by their father—was not shown to have occurred, nor was there sufficient evidence to support the disruptive actions petitioners took in the name of protecting S.G. and her sister. Sarah Greene, S.G.'s mother, was also the victim of the State's coercive intervention; her custodial rights and her responsibilities to protect her child from harm were ignored even though she was never accused of harming her children. Yet, across America, allegations like those involving S.G., and many allegations that are even less plausible or suggestive of serious harm, have become the occasion for the most intrusive interventions and disruptions of family life. (Section III *infra*).

4. Contrary to petitioners' arguments, this Court should not endorse the policy petitioners seek

to ratify. The time-tested traditional Fourth Amendment protections should be respected in order to prevent unnecessary harm to children like S.G. and her family; these protections will also help to target precious and important resources to children who are true victims of abuse. (Section IV *infra*).

ARGUMENT

I. THE STATE'S INTEREST LIES IN PROTECTING CHILDREN FROM GENUINE ABUSE, NOT IN CARRYING OUT INVESTIGATIONS IN HUNDREDS OF THOUSANDS OF UNFOUNDED CASES

In support of their claim that the policies they seek to pursue further a compelling state interest, the petitioners cite 3.2 million Hotline calls per year, concerning nearly 6 million children. Alford Br. 29; *see* Camreta Br.11. They acknowledge, however, that 690,061 children—just over 10% of the total potential victims—are "substantiated" victims of abuse or neglect. U.S. DEP'T. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2008 25 http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf ("2008 CHILD MALTREATMENT") (2009). This number represents approximately 1% of the children in the United States. *Id.* The overwhelming majority of Hotline calls and investigations are determined to be "unfounded" or "unsubstantiated." 2008 CHILD MALTREATMENT, *supra*, at 8. Moreover, the 2009

Department of Health and Human Services report shows decreases in the numbers of substantiated alleged victims for the third consecutive year. Press Release, U.S. Dep't. of Health & Human Servs., Admin. for Children & Families, Report Shows Steady Decrease in Child Abuse and Neglect, *available at* http://www.acf.hhs.gov/news/press/2011/ decreased_child_abuse_neglect.html; *see also* U.S. DEP'T. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2009, http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf ("2009 Child Maltreatment") 35 (2010). Substantiated sexual abuse has declined 5% since 2008. DAVID FINKELHOR ET AL., CRIMES AGAINST CHILDREN RESEARCH CTR., UNIV. OF N.H., UPDATED TRENDS IN CHILD MALTREATMENT 2009 (2010),http://www.unh.edu/ccrc/pdf/Updated_Trends_in_Child_Maltreatment_2009.pdf. Of course, not all of these children are alleged victims of *parental* abuse or neglect; many children are allegedly mistreated in child care settings, including foster care. *Id.* at 28.

In determining how child seizures in public schools further the State's interest in protecting children from abuse, these overall statistics bear closer examination, as do the reasons for the very high numbers of unsubstantiated cases. Indeed, a deeper understanding of child protection investiga-

tions is necessary to avoid causing more harm than good for children by expanding the powers of police and CPS investigators.[2]

While labeled an epidemic, specific forms of maltreatment have a true incidence rate that is, at best, difficult to discern from available data and the actual number of real abuse victims is lower than appears. For starters, 73.3% of "substantiated" allegations concern "neglect" or "medical neglect," not abuse. 2008 CHILD MALTREATMENT, *supra*, at 26. Neglect includes dirty homes and lack of childcare. *See* NAT'L COAL. FOR CHILD PROT. REFORM, ISSUE

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[2] A large percentage of child abuse cases involve children who are younger than nine—S.G.'s age; many involve children under the age of public school attendance. 2008 Child Maltreatment, *supra*, at 25 (showing children eight and older are 43.3% of the alleged victims; 32.6% of alleged victims are zero to three). An estimated six million children attend private schools. Council for American Private Education, Facts and Studies—Private School Statistics at a Glance, http://www.capenet.org/facts.html (last visited Jan. 21, 2011). The most serious abuse—child abuse fatalities—disproportionately involve very young children (80.8% of child abuse deaths reported in 2009 involved children younger than four). 2009 CHILD MALTREATMENT, *supra*, at 55, 61, tbl. 4.3, fig. 4.1. Indeed, infants have by far the highest child abuse death rate, with 46.2% of child abuse fatalities occurring to children younger than one year old. *See* 2008 CHILD MALTREATMENT, *supra*, at 56 (citing similar statistics). The size of the universe of children potentially aided by child protection investigations conducted in public school buildings is thus much smaller than the overall child abuse victim numbers would suggest and the policy of school-based interrogations will have little or no impact on the most serious of the child abuse cases—fatalities.

PAPER 6: CHILD ABUSE AND POVERTY, http://nccpr.org/reports/6Poverty.pdf. Other forms of physical abuse constitute the next largest category of reports (16.1%); only 9.1% of the total number of substantiated harms involve sexual abuse. 2008 CHILD MALTREATMENT, *supra*, at 26.

There are three separate, interrelated causes for the high rate of unsubstantiated cases. A discussion of these causes demonstrates why the balance of harms involved in this case is quite different than those the petitioners describe:

a. Over-reporting. Efforts to enact child abuse reporting laws in the United States began in earnest with a 1961 symposium on child abuse convened by Dr. C. Henry Kempe. DEBRA POOLE & MICHAEL LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN, A GUIDE FOR HELPING PROFESSIONALS (Am. Psychol. Ass'n, 1998). In 1973, these efforts culminated in the passage of the Child Abuse Prevention and Treatment Act ("CAPTA"), codified at 42 U.S.C. §§ 5101 *et seq.* (2010). Pursuant to CAPTA, as amended by the Keeping Children and Families Safe Act of 2003, states receive federal funding to administer child abuse hotlines and administrative registers of substantiated child abuse findings. 42 U.S.C § 5106(a)(2)(A). CAPTA requires states to have systems for receiving reports of suspected child abuse. *Id.*; 45 C.F.R § 1340.14 (c). State reporting statutes implement CAPTA's requirements. *See, e.g.*, OR. REV. STAT. § 419B.010 (2009), 325 ILL. COMP. STAT. 5/1 *et seq.* (2011).

Child "neglect" is included in what must be reported to child protective authorities. *See, e.g.*, CAL. PENAL CODE § 11166 (2010); FLA. STAT. § 39.201 (2010); 325 ILL. COMP. STAT. 5/5 *et seq.*; N.Y. SOC. SERV. LAW § 413 (2011); OHIO REV. CODE ANN. § 2151.421 (LexisNexis 2010). Persons who must report suspected abuse or neglect include virtually all persons who come into contact with children in the course of their work, from teachers and police to animal control officers and acupuncturists. *See* 325 ILL. COMP. STAT. 5/4 (Illinois law including the latter two categories). Only attorneys and clergy are typically exempt from the duty to make a Hotline call when they believe child abuse may have occurred. *See, e.g.*, 23 PA. CONS. STAT. § 6311 (2010). Oregon is unusual insofar as it exempts psychiatrists and psychologists from its reporting law. OR. REV. STAT. § 419B.010.

What is to be reported as child abuse or neglect varies from state to state, however, because there is no uniform definition of abuse or neglect. The laws defining child abuse and neglect "set no limits on intervention and provide no guidelines for decision making. They are a prime reason for the system's inability to protect obviously endangered children, even as it intervenes in family life on a massive scale." Douglas J. Besharov, *Right Versus Rights: The Dilemma of Child Protection*, PUB. WELFARE 19 (Spring 1985), *available at* http://www.welfareacademy.org/pubs/legal/rightvrights_85.pdf. *See, e.g.*, S. D. CODIFIED LAWS §§ 26-8A-2 (2010) (child's "environment is injurious to his

welfare"); OHIO REV. CODE ANN. § 2151.04 (child's "condition or environment . . . warrant the state in the interests of the child, in assuming his guardianship"). Appellate court pronouncements typically provide little helpful guidance as to what parental conduct might potentially be found deficient. *See, e.g., In re Gustavo H. and Krystal C.*, 841 N.E. 2d 50, 59 (Ill. App. Ct. 2005) (stating only that "neglect is a failure to exercise the care that the circumstances justly deserve and can be either willful or an unintentional disregard of parental duty").

Not only is the conduct or harm to be reported very broadly defined in reporting laws potentially to include all children who might be found to be victims of abuse upon investigation, but the threshold standard for child abuse reporting is deliberately very expansive as well. Abuse or neglect is to be "reasonably suspected" or "reasonably believed" under a subjective "good faith" belief standard. CAL. PENAL CODE § 11166 ("reason to suspect"); OR. REV. STAT. § 419B.010; 325 ILL. COMP. STAT. 5/4 (reasonable cause to believe); *id.* at § 5/9 (granting good faith immunity for reporter); Tonya Foreman & William Bernet, *A Misunderstanding Regarding the Duty to Report Suspected Abuse*, 5 CHILD MALTREATMENT 190, 193, no. 2 (2000). The "combination of immunities and penalties encourages the over reporting of questionable situations." DOUGLAS J. BESHAROV, FIXING CHILD PROTECTION, PHILANTHROPY ROUNDTABLE (Jan. 1, 1998) *available at* http://www.welfareacademy.org/

pubs/childwelfare/fixing_98.pdf. As result, child abuse or neglect calls are oftentimes made to Hotlines even when the child abuse reporter has doubts as to whether abuse or neglect actually occurred. This rampant reporting of abuse or neglect is justified in training and philosophy as "erring on the side of the child." RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 103 (Prometheus Books, 1990, 1995).Unfortunately, massive unsubstantiated reporting ends up erring only on "error's side;" it does not benefit children.

While most Hotline calls (57.9% in FFY 2008) come from mandated child abuse reporters, hundreds of thousands do not. 2008 CHILD MALTREATMENT, *supra*, at 6. Persons who see a child in public or who know of a child through personal acquaintance, including contending parties in family disputes, make hundreds of thousands of Hotline calls. Some do so anonymously, 2008 CHILD MALTREATMENT, *supra*, at 6; most states do not forbid anonymous calls and some expressly allow such reports. *See, e.g.*, ARK. CODE ANN. § 12-18-302(d) (2010); CAL. PENAL CODE § 11167(f).

Many investigations intrude deeply into family life without any threshold reliability determination as to the credibility of the reporter. For example, the Redlin family, plaintiffs in *Dupuy v. Samuels*, 462 F. Supp. 2d 859, 873 (N.D. Ill. 2005) ("*Dupuy II*"), *nominally affirmed and remanded*, 465 F. 3d 757 (7th Cir. 2006), *appeal after remand*, 495

F.3d 807 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008), were victimized by an unidentified Metra train rider's report.[3] That rider's report to Metra police was relayed to Illinois child protection authorities ("DCFS") who then investigated whether James Redlin's tickling of his 6-year-old son Joey (during a father-son trip to Chicago's Field Museum), constituted sexual abuse. *Id.* Joey had special needs, and the Redlins had been encouraged to use more tactile contact with him, as James had been doing. *Id.* This report led to months of intrusive restrictions on the James's unsupervised contact with his son, until the allegations were "unfounded." *Id.* In another *Dupuy II* class member's case, an anonymous neighbor caused criminal and child protection investigations of Prof. S. for alleged sexual abuse of his 8-year-old daughter that the neighbor claimed to have seen through a window; DCFS demanded that he leave his home pending further investigation, though the allegation was eventually deemed unfounded after Prof. S.'s daughter denied abuse at a Child Advocacy Center interview. 462 F. Supp. 2d. at 880-81. In the notorious case *Wallis ex rel. Wallis v. Spencer*, 202 F. 3d 1126 (9th Cir. 2000), the Hotline call source was a

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[3] The Seventh Circuit Court of Appeals in *Dupuy II* found that the demand that families like the Redlins sign safety plans, upon the representation that their failure to do so would cause their children to be taken into foster care, did not deprive them of a liberty interest on the ground that the safety plan form stated their decision was "voluntary." *Dupuy v. Samuels*, 465 F.3d 757, 762-63 (7th Cir. 2006). None of the district court's findings of fact were overturned by the Seventh Circuit.

mentally ill (multiple personality-disordered) relative of the alleged child victim who claimed her nephew was going to be ritually slaughtered; this call was not summarily dismissed as a lunatic raving in part because the mandated Hotline caller, a therapist, had some "expertise" in ritual abuse. 202 F.3d at 1133.

Hotline calls are made for all sorts of reasons, including retaliation and secondary gain. For example, *Dupuy I* class member Pearce Konold, a licensed social worker at a children's residential facility, was accused of allowing sexual abuse to occur in the boy's cottage he supervised when one of the employees he supervised attempted to shift blame away from himself. *Dupuy v. McDonald* ("*Dupuy I*"), 141 F. Supp. 2d 1090, 1119-1124 (N.D. Ill. 2001), *aff'd in relevant part*, 397 F. 3d 493 (7th Cir. 2005). In another *Dupuy I* class member's case, two Hotline calls were made against day care home owners M.K. and her husband R.K., first by the mother of a day care child after M.K. had complained about the child's poor hygiene, and then by a delivery man after R.K. refused charges for a package. *Id.* at 1125-26. Hotline calls made by contending parties to custody battles are made at six times the rate of average reporting. POOLE & LAMB, *supra*, at 18. Because the *bona fides* of the Hotline caller are generally *not* investigated before their calls are coded and sent to investigators for follow-up, *Dupuy I*, 141 F. Supp. 2d at 1095, a substantial number of calls that get investigated are ones in which the Hotline stands to benefit from child

protection system intervention against another parent or caregiver for a child.

b. Over-investigation, over-substantiation of meritless allegations and the high rate of error in substantiated findings. Amicus Attorneys General contend that the numbers of child abuse reports sent for investigation are not as inflated as the court of appeals stated, because 37.5 % of Hotline calls are "screened out." 2008 CHILD MALTREATMENT, *supra*, at 6; Attorneys General Br. 16-17. "Screening out" does occur, but screening for merit is not generally involved in this screening out process. For example, the federal court in *Dupuy I* found the screening of Hotline calls to be quite minimal: if the allegations concern a child under 18 and fit within a defined category in the state child protection system, the case is sent for investigation. 141 F. Supp. 2d at 1095.

Unlike police investigators who make no determinations of guilt or innocence, child protective services investigators make administrative findings that register individuals as responsible for abuse or neglect. *Dupuy I*, 141 F. Supp. 2d at 1096 (describing decision to "indicate" a report and cause its registry); 2008 CHILD MALTREATMENT, *supra*, at 7. In some states, the findings are called "substantiated"; in others they are called "indicated" (*e.g.*, New York and Illinois use the term "indicated" refer to "substantiated"). The amount and nature of evidence needed to substantiate a finding of abuse may be open-ended. *Dupuy I*, 141 F. Supp. 2d at

1096-97. Once substantiated, the results (*i.e.*, the names of the persons found responsible for abuse) are maintained in the state's child abuse register. *Id.* at 1099; *see* 42 U.S.C. § 5106(a)(2); *see also* 325 ILL. COMP. STAT. 5/7.14. The "substantiated" abuse and neglect numbers petitioners cite in their claims of a child abuse epidemic derive from these state child abuse registers. The numbers of real abuse or neglect cases as shown by the "substantiation" label are, however, themselves grossly unreliable.

One reason for the unreliability of the reported numbers of substantiated cases is that investigations of child abuse and neglect do not adhere to consistent standards for the assessment of evidence. Many state registers allow substantiation upon a finding of "credible evidence." *See, e.g.*, OR. REV. STAT. § 419B.030; 2008 CHILD MALTREATMENT, *supra*, at 7 (deferring to state policy for definitions of evidentiary burden to substantiate abuse); *see, e.g.*, *id.* at 154-56 (Idaho, Illinois and Indiana each use "credible evidence" standard to substantiate), *id.* at 141 (Arizona uses "probable cause" standard), *id.* at 150 (Florida uses "some substantiation" based on "credible evidence"). In practice, the already-low standard of "credible evidence" is "practically nominal" evidence. *Dupuy I*, 141 F. Supp. 2d at 1140. Indeed, inconsistent and often very low standards of evidence are a reason a national child abuse registry is considered not to be feasible. *See*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., INTERIM REPORT TO THE CONGRESS ON THE FEASIBILITY OF A NATIONAL

CHILD ABUSE REGISTRY, at 2-3, 27-30 *available at* http://aspe.hhs.gov/hsp/09/childabuseregistryinterim report/report.pdf (May 2009) (noting due process problems related to varying levels of substantiation evidence, lack of prior notice on some states, non-existent or flawed expungement procedures, and the high error rate in the registries). The report states that only 29 states have "strong legal standards" (*i.e.*, either a preponderance or clear and convincing standard), *id.* at 28, and notes that expungement procedures have "been a perpetual weakness," *id.* at 29, with only half the states providing appeals in state law. *Id.* 2009 Child Maltreatment, *supra*, confirms wide variation in substantiation rates amongst states (*e.g.*, Georgia and Massachusetts, substantiate over 55% of their investigations, while Arizona and Kansas (the only state with a "clear and convincing" standard of evidence), substantiate fewer than than 10% of their investigations). 2009 CHILD MALTREATMENT, *supra*, at 28, 159.

Some states, including California, still lack an effective means for persons named as perpetrators of abuse or neglect in an indicated finding to secure a neutral review of the basis for their inclusion in the Register. *See Humphries v. Los Angeles County*, 554 F. 3d 1170, 1201 (9th Cir. 2009), *rev'd in part on other grounds*, 131 S. Ct. 447 (2010) (remanding as to type of hearing required to afford due process). In *Finch v. N.Y. Office of Children and Family Servs.*, No. 04 Civ. 1668, 2008 U.S. LEXIS 103413 (S.D.N.Y. Dec., 19, 2008), 25,000 individuals whose appeal requests New York's Office of Child and Family

Services had destroyed successfully sued and were allowed to re-file and pursue their appeals years after being indicated for abuse or neglect. The lack of an effective means to appeal the decision to put an individual's name in the register for child abuse or neglect means that many of the hundreds of thousands of "substantiated" findings of maltreatment have not been verified by an impartial magistrate, or any neutral person for that matter.

When the validity of so-called substantiated or indicated findings *has* been subjected to such review through appeals by persons named in child abuse investigations, their rates of error have been found to be "staggering." *Dupuy I*, 141 F. Supp. 2d at 1136. Specifically, the district court in *Dupuy I* noted that the plaintiffs had established that 74.5% of indicated reports that were appealed were eventually overturned by either voluntary withdrawal of the findings by DCFS counsel or after hearings on the merits by its administrative law judges based on a "preponderance of the evidence" burden of proof for the state. *Dupuy I*, 141 F. Supp. 2d at 1102. In *Valmonte v. Bane*, the court of appeals found a nearly-identical reversal rate—75%—and determined that New York State's "some credible evidence" standard created an "unacceptably high risk of error." 18 F.3d 992, 1004 (2d Cir. 1994).

c. Poor training of investigators, high caseloads, and high turnover. In addition to operating under the open-ended, discretionary and error-prone standards described above, investigators

themselves often lack sufficient education or training to undertake the complex task of distinguishing childhood accidents from child abuse or determining if a particular touch by a parent or caregiver was innocent or sexual in nature. For example, in Illinois, to be an investigator requires only a Bachelor's degree and two years of social service or law enforcement experience, but requires no degree or experience in child development. *Dupuy I*, 141 F. Supp. 2d at 1094. Thereafter, investigators receive two weeks (49.45 hours) of specialized training in addition to the five weeks of basic child welfare agency training for all casework, licensing, and core agency staff. *Id.* Apparently, however, even these relatively modest credentialing and training requirements put Illinois far ahead of many other jurisdictions. *See also* FRONTLINE, *Child Welfare System FAQ*, http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/welfarefaq.html (citing caseworker educational credential data; also citing states that provide "one day's to several days' worth" of on-the-job training).

Caseloads for investigators are also very high, in part because "child protective agencies are increasingly overwhelmed with reports that must be addressed by inadequate numbers of staff." Foreman & Bernet, *supra*, at 195. Turnover in investigative staff is, and historically has been, extremely high. C. Stephenson, *When Family Fails: A Child's Stability, A Parent's Rights--Lives tipped upside down*, MILWAUKEE JOURNAL SENTINEL (Sept. 19, 2010) *available at* http://www.jsonline.com/news/milwau-

kee/103251879.html (citing HHS Child Welfare Information Gateway as providing estimates of national turnover between 30% and 40% a year). Burnout is a major cause of turnover. CASEY FAMILY PROGRAMS, AN ANALYSIS OF THE KANSAS AND FLORIDA PRIVATIZATION 14 (Apr. 2010) *available at* http://www.michfed.org/analysis_kansas_and_florida_privatization_initiatives_april_2010 (also noting rates of 50% turnover in some agencies following). These realities mean that child protection systems effectively allow inexperienced college graduates with no specialized child development training to determine such questions as whether a parent's tickling their child constitutes sexual abuse; such a determination against a parent adds another child sexual abuse statistic to the child maltreatment count that HHS reports. It also sets in motion a host of harms to families. *See generally*, BRENDA SCOTT, OUT OF CONTROL: WHO'S WATCHING OUR CHILD PROTECTION AGENCIES? (Huntington House, 1994) (documenting numerous insubstantial allegations that were poorly investigated, resulting in erroneous findings of abuse).

Poorly trained, unskilled, and unsophisticated investigators' failures to distinguish true abuse from innocuous behavior sometimes result in tragic harm to children who are abused while these investigators devote energy and resources on cases of those who are not abused. *See* BESHAROV, FIXING CHILD PROTECTION, *supra*, at 2. While cases involving innocuous touching, such as tickling a child on a train ride, *see supra* p. 11, consume

precious law enforcement and child protection resources, genuinely abused children do not receive the attention their dangerous situations require. [4]

In sum, while there may be an epidemic of child abuse and neglect in America, the available evidence drawn from the overall maltreatment statistics and the procedures through which the statistics come to be reported to child protection authorities, give ample ground for concluding that the reported epidemic is exaggerated or uncertain. The number of children who are real victims of parental abuse may be dramatically lower than the petitioners claim. As discussed below, this point is especially true for sexual abuse allegations.

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[4] The gruesome case of *People v. Assad*, 189 Cal. App. 4th 187 (2010), California State Ass'n. of Counties Br. 28-32, and several cases cited by the Office of the Public Guardian as illustrative of the need for a relaxed "reasonableness" standard, Br. 2-6, 14, 23, all exemplify cases in which a court has found probable cause. With few exceptions, these cases also presented ample physical evidence or parental admissions *prior to* a school interview. Three of the four Public Guardian examples, moreover, originated with a direct complaint by the child to 911, a trusted friend, or a teacher. *Id.* Interestingly, in the *Assad* case, the in-school interview itself elicited no inculpatory statements from the child himself against his father.

II. CHILD SEXUAL ABUSE ALLEGATIONS ARE PARTICULARLY PRONE TO MISREPORTING AND MISHANDLING

A. The Problem of Misreporting

The area of child sexual abuse is particularly susceptible to the problems of over-reporting and over-finding of abuse that are prevalent in the child abuse investigation system as a whole, *see Section I. supra.* Indeed, there is a general lack of data as to how many children are victims of sexual abuse; the "accuracy of a diagnosis of child sexual abuse is often difficult because definitive medical or physical evidence is lacking or inconclusive in the vast majority of cases and because there are no gold standard psychological symptoms specific to sexual abuse." Kamala London, Maggie Bruck, *et al.*, *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways Children Tell?* 11 PSYCHOL. PUB. POL'Y & LAW, 194-226, no. 1 (2005). Contributing to these inaccuracies in the reported numbers is a host of sloppy or damaging practices and wrongful beliefs that have permeated the child sexual abuse investigation field.

"Sexual abuse" is a huge category that encompasses many forms of interactions between children and caregivers, family members, and relatives. The conduct that could be labeled "sexual abuse" ranges from horrific to innocuous, or even salutary (as in the Redlin case, p. 11 *supra*). Child

sexual abuse definitions are often borrowed directly from criminal law, *see, e.g.*, 705 ILL. COMP. STAT. 405/2-3 (defining a "sexually abused child" as one whose "parent or immediate family member . . . or person who is in the same family or household as the minor" "commits or allows to be committed any sex offense against such minor, as such offenses are defined in the Criminal Code . . . "). Child protection agencies and juvenile courts extend the sweep of such offenses, however, to persons (often another parent or family member) who allegedly allow the offense and do not employ the same *mens rea* requirements as criminal proceedings.

Illinois' child protective services agency, for example, has a broad category called "substantial risk of sexual harm," defined as the creation of a "real and significant danger of abuse" when an "indicated, registered or convicted sex offender resides in the home of a child and the extent/quality of supervision . . . is unknown or suspected to be deficient." 89 ILL. ADMIN. CODE 300, APP. B. Allegation 22 Definition, *available at* http://www.state.il.us/dcfs/docs/300.pdf. Illinois also defines the very serious allegation "sexual penetration" counter-intuitively, to include digital touching (fondling) and requires no evidence of sexual intent or sexual gratification by the perpetrator to indicate the allegation. *Id.* (Allegation 19 Definition). Sexual conduct between two teenagers, who may be step-siblings or cousins, can be reported to child abuse authorities as child sexual abuse for which a parent is held responsible. *See* FAMILY DEFENSE CENTER,

2009 ANNUAL REPORT DOCKET 11-18, *available at* www.familydefensecenter.net (documenting five recently litigated cases of alleged siblings, step-siblings or cousins accused of sexual abuse). Rules and policies defining sexual abuse offenses in many states are similar. *See, e.g.*, L.A. COUNTY PROC. GUIDE § 0070-532.10 (Apr. 2007) (defining "sexual assault" as "any intrusion by one person into the genitals or anal opening of another person" (no sexual intent finding required); TEX. FAM. CODE § 2411.1(E) (2002) (defining "sexual abuse" as "sexual conduct harmful to a child's mental, emotional, or physical welfare"); TEX. ADMIN. CODE § 700.501 (1996) (stating that "compelling or encouraging the child to engage in sexual conduct" is met "whether the child actually engages in sexual conduct or simply faces a substantial risk of doing so").

Moreover, children can misinterpret many types of innocent touching as wrongful, or make statements that are misunderstood; these statements in turn can become the basis for a Hotline call. For example, a 4-year-old's statement to her mother that the "boy teacher" had "touched her pee-pee" led to an "indicated" finding that Patrick D. had sexually molested the child; an eventual neutral review showed the touching was no more than a routine backrub given to the child at naptime in a full classroom of 4-year-olds. *Dupuy II*, 462 F. Supp. 2d at 876. Even though Patrick's three children denied ever having been touched inappropriately, child protection investigators demanded that he leave his home. An

administrative law judge later faulted the investigators for an investigation that was "at a minimum sloppy" for, *inter alia*, failing to interview Patrick's co-teachers to learn about the naptime backrub practice. *Id.* at 877. While the DCFS administrative appeal process eventually exonerated him, Patrick's entire family was torn apart for 11 months due to the misinterpreted statements of the 4-year-old day care child. *Id.*

In another *Dupuy I* class member's case, a 3-year-old day care child said that the day care owner's 16-year-old son made her "lick his tooney;" this allegation apparently followed an episode in which the little girl had walked in on the boy in the bathroom. This allegation, investigated by police and child protective services as well as day care licensing authorities, resulted in the 16-year-old boy's ouster from his own home during day care hours, and the boy was arrested, though never convicted. DCFS investigators found the girl's allegations "credible" and "indicated" the boy for sexual molestation, despite suggestive questioning of the child, inconsistencies in her statements, and denial of the likelihood of abuse by numerous adults, including the alleged victim's mother. *Dupuy I*, 141 F. Supp. 2d at 1128-29. The indicated finding against the boy was eventually expunged on the grounds that he had not been afforded due process. *Id.* *Dupuy II* plaintiff Jimmie Parikh was accused of kissing 11-year-old Deana, the daughter of a family acquaintance whose own mother considered her a "liar"; even though no adults who were questioned

believed the allegations, child protection and police authorities were contacted and Jimmie was required to leave his home during the weeks-long investigation. *Dupuy II*, 462 F. Supp. 2d at 877-878.

These cases demonstrate the ease with which dubious, even far-fetched, sexual abuse claims are accepted by child abuse Hotlines and subjected to full, intrusive investigations, causing serious disruptions in children's and families lives. *See generally* SCOTT, *supra*; WEXLER, *supra* (each detailing dozens of similar cases as exemplifying "out of control" CPS investigations).

In the cases described above, the alleged perpetrators were much older than the alleged victims. But child sexual abuse allegations may involve alleged touching of one child by another child of a similar age. It thus is not accurate to say, as Petitioner Alford does, that all child sexual abuse investigations "of this type," Alford Br. 39 (heading B), concern only children who are interviewed in their capacity as a "victim" for their own protection, *id.* at 31, 39, rather than as a potential perpetrator. *See, e.g., In re T.W.*, 685 N.E. 2d 631, 635 (Ill. App. Ct. 1997) (applying sexual abuse law to both participants in consensual sex between minors). A child who had engaged in sexual activity could reasonably be concerned about her own potential culpability, regardless of how the initial triggering call to authorities was framed or who had been named in the call as a perpetrator.

Foster children who have been sexually abused prior to coming into foster care sometimes act out with each other sexually at a young age, and make accusations against their substitute care providers in an effort to gain control of their own placements. For example, 5- and 7-year-old girls placed with foster mother R.F. were violent with each other and eventually, months after being removed from her home, they leveled accusations against R.F.'s son for allegedly sexually abusing them, even though one of the children had lodged objects in her own vagina. *Dupuy*, 141 F. Supp. 2d at 1110, 1115-1117. These same children's accusations were deemed "not credible" after a Child Advocacy Center interview.

Sexual abuse claims have escalated in the past two decades in divorce/custody actions, with allegations of sexual abuse commonly used to secure custody or to block a former spouse partner from access to children. KATHLEEN FALLER, INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE: CONTROVERSIES AND BEST PRACTICE 195 (Oxford Univ. Press 2007). In *Terry v. Richardson*, for example, John Terry's ex-wife, Richelle, reported to DCFS her daughter's claim that John had kissed her "pee-pee," forced her to swallow a necklace and tried to make her kiss his "noodle." After the mother made the Hotline call, DCFS directed John to cease visitation with his daughter. A family court judge eventually cleared him, finding his daughter had been sexually abused, but "not by him." In the meantime, however, Richelle secured unfettered access to her daughter and John, a wrongly-accused

father, lost contact with his daughter for a year and a half. 346 F.3d 781, 784-92 (7th Cir. 2003).

B. Sexual Abuse Investigations Often Rely Heavily on Misinterpreted Statements of Children, and Have Given Rise to Poor Investigative Techniques

Child sexual abuse investigations are particularly invasive of the privacy of children and their families, requiring "sensitive" questions. Alford Br. 9. The victim's untainted "disclosures of abuse"—if she is indeed a victim—are often essential, given she may be the sole witness to the offense, Camreta Br. 11. Coercive, leading, suggestive, repetitive and other unprofessional questioning techniques used with an actual child sexual abuse victim can taint the evidence she provides or lead to false positive sexual abuse reports by children who were never abused. *See* STEPHEN CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM (Am. Psych. Ass'n. 1995); Karen Salekin, *The Suggestive Interview and the Taint Hearing: How Much is Too Much?*, 5 J. FORENSIC PSYCHOL. PRAC. 49-64, no. 4 (2005).

Of course, outright browbeating of children to say what the interviewer wants to hear is never recommended and should never occur. *See* J.A. 71 (after S.G. said "no they weren't [bad touches . . .] he kept asking me over and over again, and I would say,

no, I don't think my dad touched me in a bad way. He would say, "No, that's not it,' and then ask me the same question again. For over an hour, Bob Camreta kept asking me the same questions, just in different ways, trying to get me to change my answers. Finally, I just started saying yes to whatever he said."). *See* William Bernet, *Case Study: Allegations of Abuse Created in a Single Interview*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 966-970, no. 7 (1997), (discussing coercive interviewing by untrained interviewers).

Child sexual abuse investigation is not a proper area for the untrained and the insensitive. Yet, child abuse assessment has been particularly prone to quacks and charlatans who have devised untested methods for finding child abuse by inducing children to give false statements. Therapists in the 1990's began inducing recall of "repressed" memories, including memories of satanic ritual abuse. WEXLER, *supra*, at 339-41. Another fad in the field has been "facilitated communication" to enable handicapped children to disclose assumed abuse through a facilitator guiding their hands on a keyboard, despite the scientific consensus that this technique was as reliable as a Ouija board. *See* FRONTLINE, *Prisoners of Silence*, (Oct. 19, 1993) *transcript available at* http://www.pbs.org/wgbh/pages/frontline/programs/transcripts/1202.html; *see also Morris v. Dearborn*, 181 F. 3d 657, 668 (5th Cir. 1999) (finding an "abusive, irrational, malicious, and oppressive" abuse of governmental power in facilitated communication case involving a 4-year-old child).

Contrary to the urging of the petitioners, Alford Br. 45-46, Camreta Br. 3, 27, child sexual abuse researchers have documented that haste in questioning children about sexual abuse can be counterproductive; most adults who were sexual abused *never* revealed it during their childhood; actual victims may be very reluctant to reveal the abuse upon initial questioning, especially if the questioning is not done with utmost professional skill. *See* London, *supra*, at 195, 198, 201, 203-205. Child abuse victims may be "highly resistant to reporting about [real] abuse in police interviews." Lina Leander, *Police Interviews with Child Sexual Abuse Victims: Patterns of Reporting, Avoidance and Denial*, 34 CHILD ABUSE AND NEGLECT, 192-205, no. 3 (Mar. 2010). Indeed, a controlled study of actual victims has shown a marked difference in disclosure, finding "intrusive and confrontational means certainly do not help reluctant children disclose abuse." IRIT HERSHKOWITZ, ET AL., SUSPECTED VICTIMS OF ABUSE WHO DO NOT MAKE ALLEGATIONS: AN ANALYSIS OF THEIR INTERACTIONS WITH FORENSIC INTERVIEWERS, *in* CHILD SEXUAL ABUSE: DISCLOSURE, DELAY AND DENIAL, 97-113 (Lawrence Erlbaum Assoc. Publ., 2007). *See* KATHLEEN FALLER, INTERVIEW STRUCTURE PROTOCOL AND GUIDELINES, in *id.* Police and CPS investigators often receive inadequate training in sound child interviewing techniques. *Id.* at 81. Recent research has shown that compliance with a model interviewing protocol did not occur without explicit and ongoing training,

even for obvious and general interview principles such as "use open-ended questions and prompts." DEIRDRE BROWN & MICHAEL LAMB, FORENSIC INTERVIEWS WITH CHILDREN: A TWO WAY STREET, *in* KATHRYN KUEHNLE & MARY CONNELL, THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS: A COMPREHENSIVE GUIDE TO ASSESSMENT AND TESTIMONY 312 (John Wiley and Sons 2009). Moreover, even after such training, every interview must be carefully planned and developmentally appropriate language must be tailored to each interview. *Id.* at 317.

A rush to pull children out of school whenever a Hotline call alleges suspicion of sexual abuse is not a sound or necessary solution to the real concerns of true victims. Indeed, where professional techniques are employed and the documentation of actual abuse is strong, the rates of retraction of child sexual abuse allegations turn out to be very low. *Id.* at 197, 210-211. There is "little evidence to suggest that denials, recantations, and redisclosures are typical when [truly] abused children are directly asked about abuse," London *et al.*, *supra*, at 197, *see id.* at 217 (finding recantation is "uncommon among sexually abused children" whose cases have a high degree of certainty as to their abuse). Whenever there is a high degree of taint from bad interviewing, however, the end result can be what is known as the "Humpty Dumpty effect," POOLE & LAMB, *supra*, at 1045, for it can be impossible to ever determine what happened to a child whose accounts have been contaminated.

Bad interviewing thus hurts both non-victims and true victims of abuse.

III. THE ALLEGATIONS HERE ARE TYPICAL OF UNRELIABLE ALLEGATIONS THAT HARM CHILDREN AND FAMILIES

A. The Hotline Call as To S.G. Was Unreliable and Unsubstantiated, Giving Rise to A Deeply Flawed Investigation

Police are initial child abuse reporters in only 16.3% of cases, 2008 CHILD MALTREATMENT, *supra*, at 7, so in that respect, the investigation involving S.G. was not a typical child abuse investigation. But in most other respects, the investigation in her case was typical of the hundreds of thousands of investigations each year that cause children and families trauma but yield no positive child protection or law enforcement results.

S.G.'s case illustrates the hallmarks of unsubstantiated reports, including:

•The call was based on a second- or third-level hearsay report (*i.e.*, what S.G. had allegedly said to her mother and reports by the Smith's of what Sarah Greene and Nimrod Greene had *told* them). Respondent's Br. 8.

- The original source reporter of the incident is not a neutral party and may have had complex motivations to make the report (here, the family initiating the call was the former employer of the accused father). *Id.*

- The call was based in part on an unobserved touching of another child that may have been misunderstood by that child. *Id.*

- There was little or no specificity in the call (nor was specificity ever developed) as to: (a) when S.G. had been inappropriately touched, including how recently, for how long, or how frequently; or, (b) when the reported disclosure of abuse first occurred. *Id.* at 8-12;

- The nature of the touching is ambiguous (lying down on the bed with S.G.'s father, touching on top of clothes). *Id.* at 8.

These indicia all presented "red flags" showing a need for further investigation *before* the traumatic interview with S.G. occurred.

The school-based interrogation of S.G. also failed to meet the policy goal of minimal repeat interviews that the petitioners espouse. S.G. had to be re-interviewed at the KIDS Center and the ultimate results did not establish abuse; Oregon DHS therefore ultimately sought S.G.'s return to her home. Pet. App. 13. Alford and Camreta did not

keep notes or a video recording of their interview, *id.* at 4, so the basic purpose of securing valid evidence for a prosecution or juvenile court action to protect S.G. (assuming she needed protection) was not served. Unfortunately, unnecessary and intrusive interviews of children like S.G. that produce no useful evidence are a hallmark of many child abuse investigations, explaining in part why the number of reports is so high, while the number of victims of substantiated abuse is a small fraction of the total Hotline calls.

B. The Harm S.G. and Her Family Experienced Due to the Flawed Interrogation Here is Typical of the Disruption of Family Lives of Victims and Accused Family Members

The investigation in S.G.'s case was also typical of the harms children and families experience when bad practices, including poor investigative techniques, are employed without judicial authority, exigency or parental consent. Here, S.G.'s trauma was obvious: she felt sick but was "too scared" to tell the investigators, J.A. 55, and she threw up five times when she got home. J.A. 63. Her statements denying abuse were disbelieved while her statements implicating her father caused her and her sister to be taken from both parents and placed with strangers in a local foster home for 20 days. Pet. App. 12. She was then subjected to a gynecological exam without the support of her mother. *Id.* The record here does not indicate S.G.'s

responses to the idea of going back to school, but it is reasonable to assume that the experience of being pulled from class and questioned by a sheriff and an investigator for two hours did not increase her sense of security in the classroom. It is likely that she and her sister continued to feel shame at the allegations and violated by the invasion of their privacy.

Family members who are subject to false allegations of child abuse report great shame due to the allegations, even when they are cleared of wrongdoing. Sabrina Luza & Enrique Ortiz, *The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse*, INST. PSYCHOL. THERAPIES J., 3 ISSUES IN CHILD ABUSE ACCUSATIONS no. 2 (1991) *available at* http://www.ipt-forensics.com/journal/volume3/j3_2_5.htm. Family lives may change without warning and "in an instant." *Id.* Family members are left feeling defenseless and without any idea of the possible consequences that await them. Douglas J. Besharov, *Unfounded Allegations: A New Child Abuse Problem*, 83 PUBLIC INTEREST 18-33 (1986). Harms including career loss, *see Dupuy I*, 141 F. Supp. 2d at 1129-30, divorce, financial loss, and physical symptoms related to extreme stress. Leroy Schultz, *One Hundred Cases of Unfounded Sexual Abuse: A Survey and Recommendation* INST. PSYCHOL. THERAPIES J., 1 ISSUES IN CHILD ABUSE ACCUSATIONS no. 1 (1989) [*available at*] http://www.ipt-forensics.com/journal/volume1/j1_1_4.htm (finding a divorce rate of 20% due to the charges and 22% rate of losing custody). Of course, children are

often taken from parents, sometimes under threats that if they do not "voluntarily" sign away their rights, the children will be taken into foster care. *See Dupuy II*, 462 F. Supp. 2d at 893. False determinations of abuse "harm the children," *Dupuy I*, 141 F. Supp. 2d at 1130, for they deprive children of care they need; the children "lose the benefit of a stable environment" and they cause their wrongly-accused parents and other caregivers to lose "not only their pride and reputation, but often their livelihood as well." *Id.* The sense of shame in families who are wrongly accused "affects the whole self, physical, emotional mental and spiritual." Luza & Ortiz, *supra*. Families report feelings of "isolation, powerlessness, self doubt and depression." *Id.* Many express anger, shock and hurt, by virtue of the allegation and the ensuing investigation. When the investigation continues without a resolution, wrongly-accused parents and caregivers experience "agon[y] and frustrat[ion]." *Dupuy I*, 141 F. Supp. 2d at 1130.

Families do not quickly recover from the disruption of their closest attachments. Rather, the injury of a wrongful allegation is "irreparable." *See, e.g., In re Nicholson*, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2002) and *Nicholson v. Williams*, 203 F. Supp. 2d 153, *aff'd sub nom. Nicholson v. Scoppetta*, 344 F. 3d 154 (2d Cir. 2003); *Norman v. Johnson*, 739 F. Supp. 1182, 1196 (N.D. Ill. 1990) (granting preliminary injunctive relief based on showing of irreparable harm from family separation).

These harms are the predictable consequences of allowing children to be interrogated at length by strangers about interactions with their parents. The shameful nature of the accusation against the parent only heightens the damage to the child and family when the accusation itself is both misguided and poorly investigated.

IV. THE STATE'S INTERESTS DO NOT OVERWHELM THE BALANCE OF INTERESTS; ADHERANCE TO THE TRADITIONAL FOURTH AMENDMENT REQUIREMENTS FURTHERS THE STATE'S INTERESTS AND PROTECTS CHILDREN

The governmental interest in protecting children from abuse by anyone, including their parents, is "substantial." Camreta Br. 11. But the government has literally no interest at all in expending resources on investigating abuse or neglect that has never occurred, or in separating a child from a fit parent. *See Santosky v. Kramer*, 455 U.S. 745, 767 (1982). To the contrary, the government has an interest in conserving its resources so that children who were not abused or neglected by their parents are left alone, insuring that children's privacy and familial associational rights are protected, and in targeting precious available dollars to the investigation of child abuse

or neglect as to children in genuine need of protection.

In this case, an overly intrusive and ultimately misplaced serious intrusion into S.G.'s personal and family life is exactly what occurred: a child who could not be shown to have been a victim of child sexual abuse had her own and her family's life turned upside down because law enforcement and child protection authorities (Alford and Camreta) decided to use their authority under color of law to interrogate her without a warrant, court order, exigent circumstances, or parental notice or consent. S.G. and her sister K.G. became child victims of misguided attempts to ferret out child abuse where it could not be shown to exist.

As discussed in detail in Sections I and II, the vast majority of child abuse and neglect investigations are unfounded. By the same token, when serious child abuse and neglect occurs, it is often readily ascertainable and immediately meets the "probable cause" standard for judicial intervention. *See, e.g.*, n. 3, *supra*. Indeed, well-handled investigations of child abuse cases that involve the professional questioning of children bring about cases that are prosecutable as well as provable to the satisfaction of a criminal court judge, jury or a juvenile court judge or jury. Where the children receive support from their non-offending parent, instead of having their parent's interests in supporting them summarily ignored, the rates of successful prosecution also increase. Rates of

recantations are much lower in these cases as well. London, *et al.*, *supra*, at 216.

The petitioners stress the difficulties of getting information from the child without the potential taint a parent may cause. Alford Br. 41, Camreta Br. 11. They ignore that these same difficulties are ones that doom prosecutions that commence with the coercion of the intended beneficiary—the child. Children who are unwilling to disclose actual abuse are unwilling to do so for a host of valid reasons that a single interrogation session cannot hope to overcome, and a rush to "get the truth out" of an alleged victim who is a genuine victim is fraught with the danger that such interrogation will sour an otherwise effective plan. Working with the child's family is essential, 42 U.S.C. § 5106(a)(1)(E) (requiring states to "promote collaboration with the families from the initial time of contact during the investigation through treatment"), because children who see their families destroyed by virtue of their allegations may recant even truthful allegations. Dara Steele, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L. J. 933, 939 (1999). Indeed, as the amici Attorneys General note, parental support for victims is often both essential to a successful prosecution and a causal factor in failed prosecutions. Attorneys General Br. 17-18. For all these reasons, a rush to interrogate a child victim without parental consent is a bad idea all around.

The traditional Fourth Amendment requirements that the Ninth Circuit held should apply to police/CPS custodial interrogations of children in public schools strike exactly the right balance to protect the child from unwarranted intrusion, insure that sufficient evidence is secured first before rushing in, and provide for the proper level of parental involvement in legitimate investigations of child abuse. The petitioners have not shown a need to relax the Fourth Amendment standard here in light of the state's interests in law enforcement and child protection arising from child sexual abuse allegations. To the contrary, because child sexual abuse presents especially complicated circumstances bearing on children's privacy and family life and because the risk of error in these investigations is great, heightened constitutional protections help not only the child and the family but also serve the State's interests in protecting true victims of abuse and prosecuting true offenders.

CONCLUSION

For the reasons argued above, if this Court reaches the merits of this case, it should affirm the Ninth Circuit Court of Appeals' holding that the seizure of S.G. violated the Fourth Amendment.

Respectfully submitted,

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